FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 2 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION,

Petitioner,

v.

A. P. W. PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN BEHALF OF JOHNSON & JOHNSON *AMICUS CURIAE*

KENNETH PERRY,
Attorney for Johnson & Johnson.

HECTOR M. HOLMES,
of Counsel.

INDEX

	PAGE
Summary Statement of Interest, Position, and Argument	1
Matters Deemed Pertinent and Important by Congress but Disregarded by the Federal Trade Commission	5-6
Argument:	
1. It is *not* the emblem of the American National Red Cross that these "good faith" users use, but their *own* respective trade-marks deriving independently from a common and ancient source	6
2. Use by "good faith" users is to be distinguished from use that is false and deceptive from its inception	15
There Is no Precedent for the Commission's Action	17
The decision of the Commission would uproot fundamentals of trade-mark law	18
Conclusion	21-22

CITATIONS

Cases:

Federal Trade Commission v. *Algoma Lumber Co.*, 291 U. S. 67	17
Jacobs v. *Iodent Chemical Co.*, 41 F. (2d) 637	18
Loonen v. *Dietsch*, 189 Fed. Rep. 487	14-15
Socony-Vacuum Oil Co. v. *Oil City Refiners*, 44 F. Supp. 439; aff'd 136 F. (2d) 470	18
The Trade-mark Cases, 100 U. S. 82	15
United Drug Co. v. *Rectanus Co.*, 248 U. S. 90	18

PAGE

Statutes:

Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. 4.. 4, 15

American National Red Cross Act of January 5, 1905; Preamble, 33 Stat. 599, Historical Note to 36 U. S. C. A. 1 15

Swiss Coat of Arms Act, 22 U. S. C. A. sec. 248; 49 Stat. 1557 21

Trade-mark Act of 1870, 16 Stat. 210; Rev. Stat. sects. 4937, 4941 15

Congressional material:

90 Cong. Rec. (Jan. 19, 1944) pp. 396-411; and (April 24, 1944) pp. 3698-3721 5

H. R. 14330, 65th Cong. 3d Sess. 4

H. R. 6911, 7221, 7337, 7420, 77th Cong. 2d Sess.; S. 469 and S. 1398, 78th Cong. 4

Hearings before House Foreign Affairs Committee on H. R. 6911, 77th Cong. 2d Sess., pp. 9, 45, 263-265, 371 et seq., 414, 416 ...4, 5, 16, 20, 21

Hearings before House Foreign Affairs Committee on S. 469, 78th Cong. 2d Sess., pp. 116, et seq. ... 2, 5

Hearings before Senate Subcommittee of the Committee on the Judiciary on S. 2441 and H. R. 7120, 77th Cong. 2d Sess. 5

House Reports
2387, 77th Cong. 2d Sess. 5
2054, 78th Cong. 2d Sess. 5

Senate Reports
534, 78th Cong. 1st Sess., p. 4 ..... 3, 5

Miscellaneous:

Preliminary Conference of Geneva of 1863 7

Geneva Convention of 1864 (Treaty Series No. 847; 47 Statutes at Large 2074, Chapter VI, Article 19) 6, 7, 8, 9, 10, 11, 21

PAGE

Geneva Convention of 1929 ..... 8, 9, 21

Actes de la Conférence de Révision Réunie à Genève, du 26 juin au 6 juillet 1906, printed in Geneva by Imprimerie Henri Jarrys Rue de la Treille, 4, 1906, pp. 63, 162-163 9

Actes de la Conférence Diplomatique (1929) Convoquée par le Conseil Fédéral Suisse pour la Révision de la Convention due 6 juillet 1906 pour l'Amélioration du Sort des Blessés et Malades dans les Armées en Campagne, printed by the Printing Shop of Journal of Geneva, Geneva, 1930, p. 251 9

Annals of the Barber-Surgeons of London, by Sydney Young, London, 1890, p. 440 12

La Berceau de la Croix Rouge, by A. Francois .. 8

Blue Cross Plan, 2d War Conference, Reports and Discussions, Hospital Service Plan Commission, American Hospital Association, 1943, p. 5 20

Bulletin International des Societes de la Croix-Rouge, October 1910, pp. 172-207 8

The Catholic Encyclopedia, 1909 Edition, Vol. VI, p. 453 13

Century Dictionary and Encyclopedia, 1906 ed., Vol. 2, p. 1361 9

Compte Rendu de la Conférence Internationale réunie à Genève les 26, 27, 28 et 29 Octobre 1863—Supplement des Bulletin International des Sociétés de la Croix-Rouge T. XXXV, No. 137, V. Janvier 1904, pp. 14-15 8

Dictionaire Historique et Bibliographique de la Suisse, Neuchatel 1930, Vol. 5, p. 28 8

Encyclopaedia Britannica, 1945 ed., Vol. 6, p. 670 9

Encyclopedia Universal, Europeo-Americano, Barcelona, Spain, 1907, Vol. 36, p. 1550 8

PAGE

Étude sur la Convention de Genève, Librairie de Joël Cherbuliez, Paris, 1870, pp. 231-232 8

Flags of the World, Past and Present, by V. Wheeler-Holohan, 1939, p. 232 9

Genoa, How the Republic Rose and Fell by J. Theodore Bent, London, 1881, Chapter XI, p. 2 13

Handbook of Heraldry by John E. Cussaus, London, 1893, pp. 59-61 10

A Health Plan for the State of New York, by Louis H. Pink, published by Associated Hospital Service of New York, 370 Lexington Avenue, New York City, on December 11, 1945, p. 12 19

The History of the Great Plague in London in the Year 1665 by a Citizen Who Lived the Whole Time in London, London, 1819, p. 88 11

History of London from its Beginning to the Present Time, by William Maitland, London, 1775, pp. 1256-1257 13

Medical Work of the Knights Hospitallers of Saint John of Jerusalem, by Lt. Col. (now Major Gen.) Edgar Erskine Hume, Johns Hopkins Press, Baltimore, 1940 14

Persian Language and Literature, by Marcellus Donald de Redlich, printed by Haig Herant-Pakradooni, International Printing Co., Philadelphia, 1929 9

The Red Cross by Clara Barton, published by the International Society, Newark and Chicago, 1898, p. 680 16

La Révision de la Convention de Genève—Étude Historique et Critique suivie d'un Projet de Convention Révisée, Red Cross Headquarters, Geneva, 1898, pp. 9-10, 24 9

PAGE

Social Work Yearbook, 1945, published by Russell Sage Foundation, New York, p. 570 21

The Story of the Blue Cross, by Louis H. Pink, Public Affairs Pamphlet No. 101, 1945, p. 4 20

The Story of Medicine in the Middle Ages, by David Riesman, New York, 1935, pp. 17-27 ... 14

A Treatise on Heraldry, British and Foreign with English and French Glossaries, New and Enlarged, in two volumes, by John L. Woodward, Edinburgh and London, 1890, p. 160 .. 9

Der Vithangtiekens in Verbund mit Geschiendenis en Volksleven Beschound, Amsterdam, 1868, Vol. 1, pp. 398-399 14

Illustrations:

Definition of red cross in *Oxford English Dictionary* ..... appended

National Emblem of England (St. George's Cross) ..... appended

Red Cross Ensign of Tonga ..... appended

Frontispiece of *Historical Collection of Orders of Knighthood* ..... appended

Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION,

Petitioner,

v.

A. P. W. PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN BEHALF OF JOHNSON & JOHNSON *AMICUS CURIAE*

Summary Statement of Interest, Position, and Argument

This brief is filed on behalf of Johnson & Johnson, New Brunswick, New Jersey, pursuant to Subdivision 9 of Rule 27 of the Rules of this Court. It is intended to be supplementary to the brief filed in behalf of A. P. W. Paper Company, Inc., and is not designed as a complete presentation of the case.

By this proceeding, and other similar proceedings now pending and presumably awaiting the decision of this Court in this proceeding, the Federal Trade Commission

has undertaken to terminate all interstate trademark use of the symbol of a red cross and of the words "red cross."[1]

Johnson & Johnson, a manufacturer of surgical dressings, has used the symbol of a red cross and the words "red cross" as its trademark on products of its manufacture continuously since 1879. The other few remaining pre-1905 users in interstate commerce are equally interested.[2] We refer among others to John V. Canepa Co. of Chicago, Illinois, which in 1872 adopted as its trademark this symbol deriving from the flag of Canepa's native city of Genoa and the coat of arms of the Duke of Genoa, and which has used it as its trademark on its macaroni products continuously ever since; and to Chas. B. Silver & Son, of Havre de Grace, Maryland, user of the name and symbol as a trademark on canned goods of its manufacture continuously since 1876.[3]

Johnson & Johnson, in common with the few remaining pre-1905 users, has a vital interest in the issue of this case. If the Federal Trade Commission's position is sus-

---

[1] In its petition for writ of certiorari, the Commission stated (p. 12) that the "decision by this Court, if it grants certiorari, will govern the application of the Trade Commission Act to all such pre-1905 users," and (p. 13) that "the deception of those presently misled—the careless, ignorant, illiterate or foreign-born—cannot be materially curbed by an accompanying corrective statement such as the court below permits the Commission to require."

[2] Not over ten pre-1905 users in interstate commerce were known to be surviving at commencement of Congressional hearings on April 14, 1942. All but three of these present pre-1905 users, namely, Johnson & Johnson, United States Shoe Corporation, and A. P. W. Paper Company, Inc., are small firms with geographical limitation on distribution of product. As to appearances and testimony of surviving users, see hearings cited f.n. No. 9 *infra*.

[3] As to origin of Canepa's trademark and its use since 1872, see Hearings before the Committee on Foreign Affairs, House of Representatives, Seventy-eighth Congress, Second Session, on S. 469, p. 116 *et seq.* As to Chas. B. Silver & Son, see same Hearings, p. 3, *et seq.*

tained, nothing will remain of the sanction given by Congress to such pre-1905 users by the Act of 1910. The Commission will proscribe all use on the premise that only complete suppression can satisfy. The Commission may immediately terminate all use by merely finding that there are people, however unthinking and credulous, the "careless, ignorant, illiterate," who might associate any trademark use with the American National Red Cross.

Congress has always considered that the questions whether, in the public interest, (a) there shall be termination of pre-1905 commercial use, and, if so, (b) the conditions under which such termination shall be effected, are within its province to determine. Congress has consistently refused any abrupt termination as not in the public interest, and as inflicting unwarranted and unduly severe hardship on "good faith" users.[4]

There are facts and historical considerations surrounding the adoption and the continued use of these trademarks by pre-1905 users, not taken into account by the Commission, which Congress has deemed to be pertinent and important in its long and painstaking consideration of what the public inferest requires. In the light of these pertinent and important facts Congress has continued to regard the *bare naked use* of these trademarks as lawfully obtaining.[5] It has further regarded as within its own determination what, if anything further, the public interest requires shall be done.

---

[4] "It was recognized, however, that there have been good faith uses of the symbol." S. Rep. No. 534, 78th Cong., 1st Sess., p. 2.

[5] In the last Congressional Committee Report to be filed, that of the Committee on Foreign Affairs of the House, dated December 11, 1944, the Committee stated "that under existing law, there are legal uses of the symbol by commercial users". (See decision of the Circuit Court of Appeals in this case, 149 F. (2d) 424, 427.)

In the hearings in 1942, 1943 and 1944, Congress had before it and considered the matter of possible deception. It regarded possibility of deception as only one of the several matters, including equitable treatment of "good faith" users, to be taken into consideration in a situation which Congress itself had created, and over which it obviously considered it had retained jurisdiction so far as concerns the mere use of the name and symbol as a trademark by pre-1905 users. The Congressional sanction of "good faith uses" does not extend to any and all manner of use. Congress did unquestionably give the Commission authority to control abuses, deceptive accompaniments and practices. The issue in this case, however, is limited to bare naked use of the name and symbol. It is, therefore, in the field of which Congress has shown its intention to retain jurisdiction.[6]

Seldom has a question received more painstaking and thorough consideration by Congress. What Congress did in 1905 and 1910 is already before the Court. In 1919 a bill was introduced to abolish commercial use. The proponents were heard but no further action was taken.[7]

During the three years, 1942, 1943 and 1944, there were introduced in Congress seven bills[8], all proposing ulti-

---

[6] One reason advanced for proposed legislation that would eventually terminate the rights of the pre-1905 users was the alleged inference of association of the American National Red Cross with the trademarked products (Hearings before Committee on Foreign Affairs, House of Representatives, on H. R. 6911, 77th Cong., 2d Sess., p. 9). S. Rep. No. 534, 78th Cong., 1st Sess., p. 4, stated that "the protection of the public against possible deception" was a factor in proposing tapering off legislation.

[7] H. R. 14330, 65th Cong., 3d Sess., reprinted in Hearings before the Committee on Foreign Affairs on H. R. 6911, 77th Cong., 2d Sess., p. 371 *et seq.*

[8] In the Seventy-Seventh Congress (1942) H. R. 6911, 7221, 7337, and 7420; and S. 2441. In the Seventy-Eighth Congress (1943) S. 469 and (1944) S. 1398.

mate termination of commercial use of the symbol and words. No bill proposed immediate termination. The range of time proposed by the various bills was from one to twenty-five years. Hearings on these bills were held by Committees of both Houses of Congress.[9] These hearings extended over a period of approximately thirty-two months.[10] The consideration given by the Committees of Congress on this occasion is reflected, in part, in the more than eight hundred pages of printed "Hearings." In the first House hearings witnesses were heard or written statements received from some forty-three parties, in the second House hearings from some thirteen parties, and in the Senate hearings from some eleven parties. Debates on the floor of the Senate occupied forty pages of the Congressional Record.[11] There were three committee reports to Congress, two by the Committee on Foreign Affairs of the House,[12] and one by the Committee on the Judiciary of the Senate.[13] *Congress felt it essential to weigh the conflicting interests and equities of the public, the American National Red Cross, and the commercial users in the light of considerations and historical facts, of which the Commission took no cognizance.*

The Commission has disregarded, but Congress has deemed pertinent and important:

(1) that it is *not* the emblem of the American National Red Cross that these "good faith" users use; but

---

[9] Hearings before the Committee on Foreign Affairs, House of Representatives, 77th Cong., 2d Sess., on H. R. 6911, Hearings before A Subcommittee of The Committee on the Judiciary, United States Senate, 77th Cong., 2d Sess., on S. 2441 and H. R. 7420; and Hearings Before the Committee on Foreign Affairs, House of Representatives, 78th Cong., 2d Sess., on S. 469.

[10] April 14, 1942 to December 8, 1944.

[11] 90th Cong. Rec. (Jan. 19, 1944), pp. 396-411, and (April 24, 1944) pp. 3698-3721.

[12] H. Rep. No. 2387, 77th Cong., 2d Sess. (July 24, 1942), and No. 2054, 78th Cong., 2d Sess. (December 11, 1944).

[13] S. Rep. No. 534, 78th Cong., 1st Sess. (November 15, 1943).

their *own* respective trademarks deriving independently from a common and ancient source.

(2) that use by the "good faith" users is to be distinguished from use that is false and deceptive from its inception.

ARGUMENT

1. It is *not* the emblem of the American National Red Cross that these "good faith" users use, but their *own* respective trade-marks deriving independently from a common and ancient source.

The complaint alleges (R. p. 16):

> "PARAGRAPH SIX: The Red Cross name and emblem as provided by the Geneva convention of 1864 soon became heralded throughout the world. Various manufacturers and commercial houses in the United States were quick to capitalize on its popularity and public appeal. In a few years following the conclusion of the Geneva convention, American manufacturers began to use trade-marks employing the Red Cross name and emblem, and articles of commerce bearing the Red Cross name and emblem began appearing all over the United States. This practice began as early as 1872, soon became indiscriminate, and has continued."

No evidence was introduced to support this allegation. No finding was made to this or any similar effect. In the "FINDINGS AS TO THE FACTS", the only reference related to this allegation is "Paragraph Twelve" (pp. 47-48), reading:

> "Paragraph Twelve: It is insisted by respondent that the use of a red cross as an emblem or insignia dates back several centuries and that such use long antedated the Red Cross organization. The *record indicates,* however, that the use of a red cross in the

particular form and coloration here involved—a Greek red cross on a white ground—had its origin in the Geneva Convention of 1864. The emblem was formed by reversing the colors of the flag of Switzerland. The red cross used prior to that time was usually in the form of an ecclesiastical cross or in some other form differing from the Greek red cross." (Italics furnished.)

This "finding" appears to concede that the use of the symbol of a red cross and of the words "red cross" is ancient, except for a "Greek red cross on a white ground". There is *no testimony or other evidence* in the record to support the finding that the Greek red cross on a white ground had its origin in the Geneva Convention of 1864.

Responsible historical sources establish that it was not through any adoption and use initiated at Geneva in 1864 that the red cross acquired its significance of charity, mercy, care of wounded, sanctuary, hospitalization, relief of suffering, sanitation, medicine, surgery, and products associated with these fields. Quite the contrary. It would have been difficult for the conferees in 1864 to have chosen an emblem of richer historical significance, or an emblem at that time of more universal use and acceptance in Christian countries. The association of the red cross with these fields antedated 1864 by centuries. It is an inescapable conclusion that the Geneva Convention adopted this symbol not to give it significance, but because this symbol already had that significance. This the founders themselves recognized.

Gustave Moynier was a distinguished Swiss attorney, president of the Geneva Society of Public Utility that called the preliminary conference of 1863, a delegate of the Swiss Government at the Conference of 1864, and first president of the International Committee from 1864 to

1910.[14] As to the adoption of the symbol, Mr. Moynier stated in his *A Study of the Geneva Convention*[15] published 1870 that "the symbol of charity is that which responds best to the sentiments by which the promoters of the convention were animated and to the spirit of this treaty," and he referred further to it as "the bloody cross of Calvary framed in a shroud of innocence."

There is nothing in the Convention of 1864 nor in the minutes of the Conference to support any assertion that "the emblem was formed by reversing the colors of Switzerland". Reference to the Swiss colors in the 1906 revision of the Geneva Convention was an afterthought in an effort to strip the emblem of its religious association, to make it more acceptable to Turkey, Egypt, Persia, and other non-Christian countries. The fact that the cross could not be separated from its ancient religious significance by mere parliamentary pronouncement became quite clear, with the result that eventually in the 1929 revision of the Convention, the red crescent (the religious symbol of certain Mohammedan countries), and the red lion and sun (the spiritual symbol of the Persians) were

---

[14] Compte Rendu de la Conférence Internationale réunie à Genève, les 26, 27, 28 et 29 Octobre 1863—Supplement des Bulletin International des Sociétés de la Croix-Rouge T. XXXV, No. 137, V. Janvier 1904, pp. 14-15.

Bulletin International des Sociétés de la Croix Rouge, October 1910, pp. 172-207.

Gustave Moynier by Bernard Bouvier.

La Berceau de la Croix Rouge by A. Francois.

Dictionaire Historique et Bibliographique de la Suisse, Neuchatel 1930, Vol. 5, p. 28.

Encyclopedia Universal, Europeo-Americano, Barcelona, Spain, 1907, Vol. 36, p. 1550.

[15] Étude sur la Convention de Genève, Librairie de Jöel Cherbuliez, Paris, 1870, pp. 231-232.

put on an equal footing with the red cross as recognized emblems of the convention.[16]

The only reference to the symbol in the Convention of 1864 is in the provision of Article 7 that "the flag and arm band shall bear a red cross on a white ground." The minutes of the convention are silent on the form, character, and source of the cross. There is no suggestion of newness, uniqueness, or exclusiveness. In fact, there is no mention of red cross in the convention other than the words just quoted.

Nothing can be found to support the Commission's "finding" that "The red cross used prior to that time (1864) was usually in the form of an ecclesiastical cross or in some other form differing from the Greek red cross". Heraldic authority is to the contrary.[17] (And see illustrations appended to this brief.) Apart from the fact that the word "Greek" was never mentioned in the

---

[16] Treaty Series No. 847; 47 Statutes at Large 2074, Chapter VI, Article Nineteen. As to recognition of the symbol as having religious significance and the effort to strip it of that significance, see *La Révision de la Convention de Genève—Étude Historique et Critique suivie d'un Projet de Convention Révisée*—a publication of the International Committee of the Red Cross at its headquarters, Geneva, 1898, pp. 9-10, 24; *Actes de la Conférence de Révision Réunie à Genève*, du 26 juin au 6 juillet 1906, printed in Geneva by Imprimerie Henri Jarrys Rue de la Treille, 4, 1906, pp. 63, 462-163; and *Actes de la Conférence Diplomatique (1929) Convoquée par le Conseil Fédéral Suisse pour la Révision de la Convention du 6 Juillet 1906 pour l'Amélioration du Sort des Blessés et Malades dans les Armées en Campagne*, printed by the Printing Shop of *Journal of Geneva*, Geneva, 1930, p. 251. As to significance of the red crescent and red lion and sun, see *Encyclopaedia Britanniea*, 1945 ed., Vol. 6, p. 670; *Flags of the World, Past and Present* by V. Wheeler-Holohan, 1939, p. 232; and *Persian Language and Literature* by Marcellus Donald de Redlich; printed by Haig Herant-Pakradooni, International Printing Co., Philadelphia, 1929.

[17] *A Treatise on Heraldry, British and Foreign with English and French Glossaries*, New and Enlarged, in two volumes, by John L. Woodward, Edinburgh and London, 1890, p. 160.

convention nor in any early definition of the symbol, the very word "Greek" in describing the character of the cross is indicative of origin other than and earlier than Geneva 1864. A Greek cross is authoritatively defined as "an upright crossed in the middle at right angles by a beam of equal length."[18] In heraldry it is the basic cross of which many others are variations.[19] Certainly there is nothing novel in coloring the cross red, a color commonly associated with crosses in attaching "the memory of the bloody cross of Calvary," as Moynier expressed it (*supra*). This red cross is the national emblem of England. (See illustration appended to this brief.)

The words "red cross" and the single hyphenated word "red-cross" were in common usage in the English language for at least four hundred years prior to 1864. In the eighteen editions of Webster between 1828 and 1890 the only definition for the word is as follows:

> "red cross, n. The cross of St. George, the national emblem of the English."

This red cross flies on the Union Jack today.

In the Webster's edition of 1890 appears for the first time a *second* definition:

> "(b) the Geneva cross. See Geneva convention and Geneva cross, under Geneva."

The Century Dictionary, in its edition of 1889, gives fifteen lines to historical uses and six lines to Geneva 1864.

The fullest treatment is that in the *Oxford English Dictionary*, 1933, which devotes seventy-four lines to red cross. It is of such interest that we are appending to this brief a reproduction of it in double actual size for ease in reading.

---

[18] *Century Dictionary and Encyclopedia*, 1906 ed., Vol. 2, p. 1361.

[19] *Handbook of Heraldry* by John E. Cussaus, London, 1893, pp. 59-61.

The first definition of the *Oxford English Dictionary* is as follows:

> "red cross, red-cross
> 1) a cross of red colour; esp. a. as the national emblem of England; St. George's Cross."

Under this definition follow six instances of such usage in 1430, 1578, 1601, 1652, 1805, and 1838. The instances given do not pretend and are not intended to be exhaustive and inclusive of all written use, but rather are typical of usage in the language at the times of instances cited.

The second use defined in the *Oxford English Dictionary* is as a sign of medical quarantine in sanitation—"as the mark made on the doors of infected houses during the London plagues of the 17th century." A portion of the ordinance of the Council of the City of London adopted in 1665 reads:[20]

> "Every Visited House to be Marked.
> "THAT every house visited, be marked with a red cross of a foot long, in the middle of the door, evident to be seen, and with these usual printed words, that is to say 'Lord have mercy upon us', to be set close over the same cross, there to continue until lawful opening of the same house."

That a red cross should be used for this purpose is not at all surprising, for the symbol had already at that time (1665) become firmly attached to medicine. The Society of Barber-Surgeons of London was granted its charter by King Edward IV in 1462. The Barber-Surgeons constituted the medical profession of the day. Their symbol of the equilateral red cross was officially confirmed to them

---

[20] *The History of the Great Plague in London in the Year 1665* by a Citizen Who Lived the Whole Time in London, London, 1819, p. 88.

as early as 1589.[21] They had derived their use of the symbol from their own religious origin associated with hospitals, which, in those days, were exclusively ecclesiastical institutions.

In the *Oxford English Dictionary* there are other additional uses listed before mention of use deriving from Geneva, 1864, the last in point of time. It is clear from this source alone that the symbol did not come into being through the Geneva Convention of 1864; that it was not created by the Geneva Convention of 1864; and that it was not unique to the societies formed under the Convention of 1864. On the contrary, the use under the Convention of 1864 was the last use in the field. It could scarcely expect to preempt so rich an historical usage, including usage signifying the emblem of England.

In addition to the emblem of England, the cross in some color, frequently red, appears in the flag of nearly every Christian country. A red cross appears in the state and territorial flags of Alabama, Florida, Maryland, and Hawaii; in the national flags of Great Britain, Australia, Iceland, India, South Africa, Canada, New Zealand, Jamaica, Latvia, and Tonga; in the merchant flags of Great Britain, Iceland, Latvia, Australia, India, Canada, South Africa, New Zealand, and Jamaica; in the city flags of Jerusalem, Constantinople, London, and Geneva; and in the early North American flags of John Cabot (1497), Colonial Flag of 1620, Governor Endicott Flag (1634), New England Ensign (1652), Governor Andros Flag (1686), Escutcheon Ensign (1701), English Red Ensign (1705), Newberry, Massachusetts (1720), New England (1737), Taunton Flag (1774), Bunker Hill Flag (1775), First Navy Ensign Cambridge Flag (1775), and Westmoreland Co., Pennsylvania (1775).

---

[21] *Annals of the Barber-Surgeons of London*, by Sidney Young, London, 1890, p. 440.

Dating from the Crusades, the red cross has been a symbol of trade and commerce; in shipping, banking, medicine, by barbers, goldsmiths, silversmiths, armorers, card makers, curriers, printers, as a store sign of identification, and as the symbol of nationally sponsored enterprises.

In the category of nationally sponsored enterprises may be listed the trade-marks of Hudson's Bay Company, East India Company, African Company, and South Sea Company. Each bears the red cross of St. George, the Greek red cross on a white ground. That of the Hudson's Bay Company has been in use in world-wide trade since grant of Letters Patent by Charles II in 1670; and that of the East India Company since grant of Queen Elizabeth in 1601.[22]

The Genoese spread the mark far and wide in the commerce of the thirteenth and fourteenth centuries. St. George had been the patron saint of the Genoese Republic from early years.[23]

> "Under the banner of the Red Cross, and the emblem of St. George, countless galleys left this part of Genoa day by day to bring back from far distant lands the wealth of India, China, and the East. No port or harbour of the then known world was unvisited by them; from Moorish Spain, from England, Flanders, and the far north they brought back cargoes of merchandise * * * In a word, these mediaeval Italian republics, Genoa, Pisa, and Venice, rewove the web of international intercourse which the barbaric hordes had broken."[24]

---

[22] *History of London from its Beginning to the Present Time*, by William Maitland, London, 1775, pp. 1256-1257.

[23] *The Catholic Encyclopedia*, 1909 Edition, Vol. VI, p. 453.

[24] *Genoa, How the Republic Rose and Fell*, by J. Theodore Bent, London, 1881, Chapter XI, p. 2.

The commercial use derives and dates, in fact, from the Crusades.

> "The red crosses were the most numberous, in addition, it was the sign of the Crusaders. The innkeepers of the Middle Ages hung them out as signs to passing Crusaders; then, when they had finished their journeys to the Holy Land and had earned lifelong fame by so doing, naturally used this cross afterwards as a sign in their profession or trade."[25]

The use of a red cross as a trade-mark on medical products was quite natural. It was the symbol of hospitalization, medicine, and surgery, deriving from the Church that in the Middle Ages was the sponsoring agency for these activities. Early medical practitioners were monks who traveled about. The mark of the Church became the mark of the activity of the Church.[26] Moreover, as stated above, the red cross was the confirmed emblem of the Barber-Surgeons, the medical practitioners of the Sixteenth and Seventeenth Centuries.

In his book on the Knights Hospitallers of the Order of Saint John of Jerusalem,[27] General Hume reviews the medical work of the order from its beginning in the Crusades to today, and the association, beginning in the Crusades and enduring today, of the emblem of this holy Order (the white cross on a red ground) with hospitalization, medicine, and surgery.

Judge Learned Hand, in the case of *Loonen* v. *Dietsch*, 189 Fed. Rep. 487 (S. D. N. Y. 1911), sustained a pre-1905 red cross trademark for toothbrushes. Speaking at a time closer to the conditions prevailing prior to 1905, he

---

[25] *Der Vithangtiekens in Verbund mit Geschiendenis en Volksleven Beschound, Amsterdam*, 1868, Vol. I, pp. 398-399.

[26] *The Story of Medicine in the Middle Ages*, by David Riesman, New York, 1935, pp. 17-27.

[27] *Medical Work of the Knight Hospitallers of Saint John of Jerusalem*, by Lt. Col. (now Major Gen.) Edgar Erskine Hume, Johns Hopkins Press, Baltimore, 1940.

found (p. 489) that no bad faith was involved in the pre-1905 adoption of the mark, that the mark "is an easily caught symbol with an indefinite atmosphere, a kind of aseptic aura, connotating clean preparation and careful protection from dirt. The complainant did only what others have done in exploiting that popular conviction, and the conclusion is pretty clear that those who so selected it not only had some such reason in mind, but succeeded in making the suggestion they intended to others * * *. It has been used on hospital ambulances, upon medicaments, upon doctors' motor cars, upon barber shops, upon laundries, and for military field service not connected with the Red Cross Society. In short, until the legislation of 1905 * * *, it had been quite instinctively adopted for many uses which were congruous with the chief objects of the society, but which did not indicate that the society had anything to do with them, or certainly with the frequency of use ceased to do so. Finally, Congress has clearly recognized that fact by permitting all those who prior to 1905 had used the mark lawfully, to continue. This appears beyond question in the Act of June 23, 1910, C. 372, 36 Stat. 604."

2. Use by "good faith" users is to be distinguished from use that is false and deceptive from its inception.

Those who, like Johnson & Johnson, adopted the ancient name and symbol as a trade-mark prior to 1881, did so before there was an American National Red Cross in this country.

As to them the American National Red Cross is the second comer.[29]

---

[29] The first trade-mark registration act was that of 1870. (16 Stat. 210; Rev. Stat. sects. 4937, 4941.) It was declared invalid in 1881. (*The Trade-mark Cases*, 100 U. S. 82.) Therefore, there were no Federal registrations prior to 1870. The American National Red Cross did not file its trade-mark registration until 1897. It was registered in the United States Patent Office as No. 30,428, under date of July 27, 1897.

Those who adopted subsequent to 1881 and prior to 1905, did so at a time when the American National Red Cross was so small and obscure that public knowledge of its existence could have been very limited at best and its future growth not foreseen. Writing in 1898 on the failure of the Society to attain recognition and prominence, Miss Clara Barton said[30] "* * * thus the Red Cross has stood, unrecognized in the shadows of obscurity all the eighteen years of its existence among us, waiting for the sure, alas, too sure, touch of war, to light up its dark figure, and set in motion the springs of action." In 1902 the receipts of the American National Red Cross were $343.80. Membership in 1902 was 123; in 1903, 298; in 1904, 663; and in 1905, 3,357. Not until 1916, with the first World War, did membership exceed 22,500.[31]

Obviously the early pre-1905 adopters of the name and symbol for commercial usage were not poachers. Their adoption was not for the purpose of deception, nor was their use deceptive or improper. It contained no false representation. There was no good will of a yet to be founded American National Red Cross upon which to trade. Trade-mark users were in those days adopting crosses of every form and every color, *far more often of a form other than Greek and of a color other than red.*[32] Only ten of the presently surviving trade-marks in use in interstate commerce appear to have been of the Greek red cross (*supra*, f. n. 2).

---

[30] *The Red Cross* by Clara Barton, published by the International Society, Newark and Chicago, 1898, p. 680. See also pp. 5, 6 to effect that the news of accession of the Government of the United States to the Treaty of Geneva in 1882 was announced to the people of America only in "a little four-line paragraph in the Congressional doings of the day in the *Evening Star.*"

[31] House Hearings, Committee on Foreign Affairs, on H. R. 6911, 77th Cong., 2d Sess., pp. 263-265.

[32] House Hearings Committee on Foreign Affairs, on H. R. 6911, 77th Cong., 2d Sess., pp. 418-425.

The Senate Committee described the early users as "good faith" users (*supra*). Continued use by these users since 1905 has been with the expressed approval of Congress, fully cognizant of all the facts. In 1910 the American National Red Cross agreed that it did "not want to disturb" those users.[33]

For these reasons Congress has shown grave concern for the equities of these "good faith" users. Congress has recognized that although a tapering off period (with the right for a substantial time to say "formerly red cross") might diminish the damage, nevertheless, the loss of a long-established good will, built up over a long period of time, could be most injurious, if not ruinous, especially to a small, highly competitive business. If such a manufacturer must brand his product with a new mark, he will then be offering not the old, familiar brand, but an unknown brand, in competition with long-established and well-known brands; and he will, to a substantial extent, be starting all over again.

There is no Precedent for the Commission's Action

The Commission can point to no case where a trademark innocently adopted, without falsity or deception, and a good will lawfully developed and established, have been wiped out because of a second comer or because an earlier comer has eventually become dominant, regardless of some possible public confusion.

In all the cases cited by the Commission the labels or statements ordered discontinued were false and untruthful from inception.[34] Where good will has been innocently

[33] House Hearings, Committee on Foreign Affairs, 77th Cong., 2d Sess., on H. R. 6911, p. 45.

[34] In the case of *F. T. C.* v. *Algoma Lumber Co.*, 291 U. S. 67, defendant advertised yellow pine (an inferior pine) as "white" pine, which is a superior product. The Commissioner's brief is in error in stating that this was a case where there was no initial deceptive act.

and in good faith established and attached to trade-mark use in a certain field or area, an earlier user who becomes dominant cannot enjoin such good faith user (*United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90). Nor can a second user who becomes dominant by national advertising and distribution, enjoin the small, local first user of the same mark on the same goods (*Jacobs* v. *Iodent Chemical Co.*, 41 F. (2) 637, C. C. A. 3rd; involving the well-known "Iodent" toothpaste). It makes no difference that continued use by an innocent second comer in his own territory will cause some public confusion. (*Socony-Vacuum Oil Co.* v. *Oil City Refiners*, 44 F. Supp. 439; aff. 136 F. (2) 470, C. C. A. 6th.) The court pointed out (44 F. Supp. 439, 440) that any public confusion resulted from no wrongful conduct, and that it was not therefore incumbent on the Court to alleviate any such confusion.

Pre-1905 users are using their own marks (not the emblem of the American National Red Cross) in their own limited fields. Such mere use is honest and truthful. The goods thus marked are the products that the public has been buying under this identifying trade-mark for over half a century. This mark enables the public to identify the products that the public has found to be good and wants.

The decision of the Commission would uproot fundamentals of trade-mark law

A decision sustaining the Commision would, for the first time so far as we can determine, destroy a trade-mark and good will, honestly and lawfully and innocently established and developed, the use of which is truthful and honest and not tinged with fraud, solely because another but no more lawful or rightful user has become dominant, whereby there may be "careless, ignorant, illiterate" people who will believe there is some connection.

The situation faced today by trade-mark owners of the red cross is not unlike that which may be anticipated by owners of a trade-mark of a red star, a blue cross, a green cross, or a white cross. *They are threatened with loss of their property through no wrongful act or negligence of their own, but rather through the acts of another in attaining extraordinary prominence, in becoming better known to the public.*

The red star is an old and valuable trade-mark of of one of the country's leading department stores. The red star is becoming increasingly famous and recognized in this country as the emblem of the United Socialist Soviet Republics. Its continued use by the department store as a trade-mark will almost surely suggest, if it does not already suggest, to some uninformed persons, "the careless, ignorant, illiterate," a connection with the U.S.S.R. In that likely event, continued use of its red star trade-mark by the department store will become an unfair and deceptive practice, to the same extent as present use of the red cross as a trade-mark.

The same is true of the many blue cross trade-marks; for the blue cross is rapidly attaining acceptance as the emblem of the Blue Cross Hospitalization Plan. This Blue Cross movement is hospital sponsored, is now in effect in 3,500 hospitals, and includes some 20,000,000 paid memberships in the United States, Canada, and Puerto Rico.

> "The growth of the Blue Cross movement—20 million in a twelve year period, most of it in the last five years—is a practical proof of what can be done through voluntary effort."[35]

The growing prominence of the Blue Cross Hospitalization Plan may be compared with the experience of the

---

[35] *A Health Plan for the State of New York*, by Louis H. Pink, published by Associated Hospital Service of New York, 370 Lexington Avenue, New York City, on December 11, 1945, p. 12.

American National Red Cross. In 1902 the membership of the American National Red Cross was 123 members, and its receipts for the year 1902 were $343.80.[36] In only two years, namely 1917 to 1919, of the period 1900 to 1941, inclusive, did the total membership of the American National Red Cross, including both adult and junior membership, exceed 20,000,000. Even as recently as 1941 it was less than 20,000,000. The Blue Cross Hospitalization Plan is *growing rapidly*, at the rate of "200,000 members a month, or 2.4 million a year.[37]" Continued use of the blue cross as a trade-mark, as by one of the country's leading pharmaceutical manufacturers, will almost surely suggest, if it does not already suggest, to some uninformed persons, "the careless, ignorant, illiterate," a connection with the Blue Cross Hospitalization Plan. In that likely event, continued use of its blue cross trade-mark by the pharmaceutical manufacturer will become unfair and deceptive, to the same extent as present use of the red cross as a trade-mark.

The Greek green cross on a white ground and the Greek white cross on a green ground have both come to symbolize safety. Both marks are employed by the National Safety Council. The National Safety Council has a membership of approximately 6,000. The member-organizations are of the following character: industrial, commercial, public utility, transportation and insurance companies, municipal and state departments of public safety, local safety councils, chambers of commerce, automobile clubs,

---

[36] Hearings Before the Committee on Foreign Affairs, House of Representatives. 77th Cong., 2d Sess., on H. R. 6911, pp. 264-265.

[37] *The Story of the Blue Cross*, by Louis H. Pink, Public Affairs Pamphlet No. 101, 1945, p. 4; *Blue Cross Plan*, 2nd War Conference, Reports and Discussions, Hospital Service Plan Commission, American Hospital Association, 1943, p. 5.

schools, libraries, and miscellaneous civic organizations.[38] It is not unlikely that one or both of these symbols of the Greek white cross on green ground and the Greek green cross on white ground will attain such recognition as the emblem of safety or of the National Safety Council as to make trade-mark usage deceptive to the same extent as present use of the red cross as a trade-mark. The Greek green cross on white ground is the trade-mark of the country's largest wholesale distributor of general retail package merchandise.

The Greek white cross on a red ground is the national emblem of Switzerland. In 1936 Congress passed an act[39] prohibiting further adoption of this emblem as a trade-mark, with "equitable reservation of the rights of persons or corporations who had lawfully adopted and legitimately used" the emblem prior to passage of the act.[40] This legislation was intended to parallel, under the provisions of the Geneva Convention of 1929, the prohibitions against the commercial use of the symbol of a red cross on a white ground. The white cross on a red ground is the recognized trade-mark of a manufacturer of surgical dressings that are distributed nationally. To some uninformed persons, "the careless, ignorant, illiterate," this trade-mark may suggest connection with the Swiss Government.

CONCLUSION

There is no evidence in the record to support the vital finding of the Commission "that the use of a red cross in the particular form and coloration here involved—a Greek red cross on a white ground—had its origin in the Geneva Convention of 1864." The present brief cites conclusive evidence to the contrary.

---

[38] Social Work Yearbook, 1945, published by Russel Sage Foundation, N. Y., p. 570.

[39] Title 22, U. S. C. A. Section 248; 49 Stat. 1557.

[40] See Hearings Before the Committee on Foreign Affairs, House of Representatives, 77th Cong., 2d, on H. R. 6911, pp. 414, 416.

Neither has the Commission cited any case wherein a mark or symbol not *per se* deceptive, adopted and used in good faith and without collateral deceptive acts, has been suppressed because of a secondary meaning attaching to the mark or symbol as a result of a *subsequent* public, quasi-public, or private dominant use.

The decision of the Circuit Court of Appeals represents the fair solution of the difficulties that prompted issuance of the Commission's complaint. It is in harmony with the tradition of related trade-mark decisions. If the decision of the Circuit Court of Appeals were reversed and the order of the Commission sustained, the fundamentals of trade-mark law would be uprooted: a trade-mark owner would be left in fear of extinguishment of his property at any time that the Commission might find that some other public, quasi-public, or private organization, for whatever reason, had become dominant.

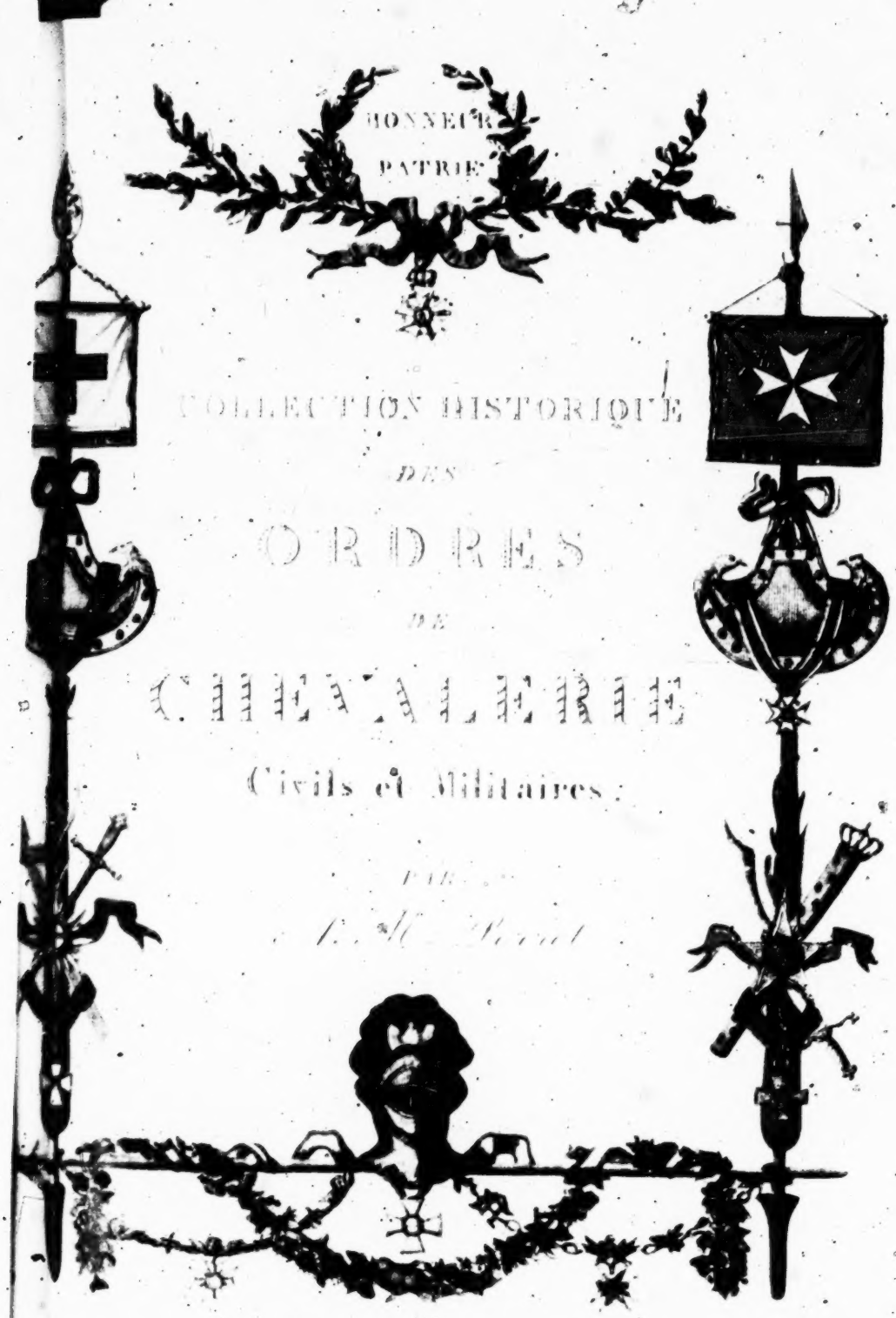
The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

KENNETH PERRY,
Attorney for Johnson & Johnson.

HECTOR M. HOLMES,
of Counsel.

Dated: New Brunswick, N. J.
December 27, 1945



COLLECTION HISTORIQUE

DES

ORDRES

DE

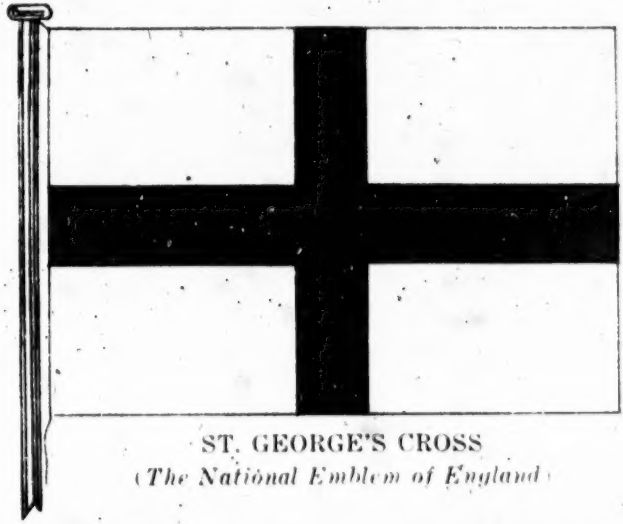
CHEVALERIE

Civils et Militaires;

PAR

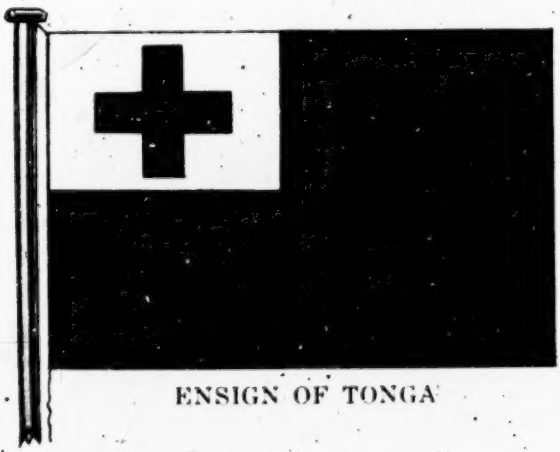
L. M. Perrot

Frontispiece of *Historical Collection of the Orders of Knighthood* by A.-M. Perrot, published by Aimé André, Paris, 1820



ST. GEORGE'S CROSS
(The National Emblem of England)

Reproduced from *Flags of All Nations*, printed for His Majesty's Stationery Office, London, 1907, by authority of the Admiralty. P. 4 illustrations of British Empire.



ENSIGN OF TONGA

Op. cit., supra, p. 12 illustrations of British Empire. This illustrates "the dumpy St. George's Cross" (*Flags of the World* by W. J. Gordon, published by Frederick Warne & Co., London, 1915, pp. 103, 110) adopted as early as 1869 and made perpetual by the Constitution in 1875. (*A History and Geography of Tonga* by A. H. Wood, printed by C. S. Summers, Government Printer, by authority, Nuku 'Alofa, Tonga, 1932, p. 58).

…*bs. rare*.
…*Hen. VIII*, XIV. i. 68
…ter fall of the said Red
…land should by another
…V. Barlow] *Answ. Name-*
…White-liverd Red-cap.
Obs. rare —¹.
…Dec. 11/2 Red-Cap, [or]
…resembles a Tea-Spoon;

…any birds..seem to have
…rkshire]. Woodpeckers
…finches, red-caps. [1795
…ar Dick Redcap, what
…6 The red-cap, hanging
…ennyson *Gardener's D.*
…nightingale Sang loud.
…nc., Shropsh., etc.).

…*l.* 25 The farmers call it

…z a red cap; capped

…Pl. 17 The Red-capped
…r every part of the sea-
…ited. 1865 — *Handbk.*
…Robin of the Colonists.
…ped Parrot (*Pionopsitta*
…*Moths* I. 64 Sailors in

…rican evergreen tree,
…ood of which is exten-
…he toon-tree or Moul-
…An Australian timber-

…Cedar. An Evergreen,
…33 *Planting* 122 in *Lib.*
…ed cedar..attains to the
…loam soils. 1843 Holt-
…of *Juniperus virginiana*
…In New South Wales the
…t of *Flindersia australis*,
…-tree, or *Cedrela Toona*.

some make a sauce of redco for sodden meat. 1597 Gerarde *Herbal* II. vii. § 2. 187 Horse Radish..is called in the north part of England red-cole. 1673 *Wedderburn's Voc.* 18 (Jam.) *Raphanus rusticanus*, red-col.

Red-collared, -coloured, -combed, -crested: see Red *a.* 14 a, 14 b.

Red cross, red-cross.

1. A cross of a red colour; *esp.* **a.** as the national emblem of England; St. George's Cross.

c 1430 *Agincourt* 89 in Hazl. *E. P. P.* II. 96 On euery panes a crosse rede, .. Saynt Georges stremers sprede ouer hede. *a* 1578 Lindesay (Pitscottie) *Chron. Scot.* (S. T. S.) II. 29 The Scottis..war all faine .. to tak on the reid crose and to be sworne as natiue subiectis of the king of Ingland. 1601 J. Wheeler, *Treat. Comm.* 30 Wearing the red Crosse or Cognizance of England. 1652 Evelyn *Diary* 6 Mar., Heraulds carrying the armes of the State (as they cal'd it), namely, the red crosse and Ireland. 1805 Scott *Last Minstr.* I. vi, To see St. George's red cross streaming. 1838 Haliburton *Clockm.* Ser. II. i, On fresh or on salt water,..down comes the red cross and up go the stars.

b. as the mark made on the doors of infected houses during the London plagues of the 17th century.

1636 *Direct. Cure Plague* H 2 b, That euery house visited be marked with a Red Crosse of a foot long, in the middle of the doore. 1654 Whitlock *Zootomia* 529 A Door,.. and a red Crosse on it would..effectually bring a licentious Gallant out of conceit with a Brothell-house. 1664 Killigrew *Parson's Wedding* IV. iii, Let us not forget ourselves in our grief; I am not ambitious of a Red Cross upon the door. 1665 *Orders Ld. Mayor & Aldermen City Lond.* B. 2 [as in quot. 1636 above].

c. as the badge of an ambulance service (see 2 c); the Geneva cross (see Geneva ²).

1863 *Resolutions*, etc. *Conf. Geneva* § 8 They shall wear round the arm..a white band with a red cross upon it. 1891 Hulme *Heraldry* (1897) 269 The doctors, nurses, and assistants have a white armlet with the red cross, the sacred badge that proclaims their errand of mercy.

2. *transf.* †**a.** An English ship. *Obs.*—¹

1622 Capt. Smith *New-Eng. Trials* Wks. (Arb.) 262 More afraid..then the smallest red crosse [that] crosses the seas would be..of any French Piccaroun [etc.].

1. The act…
in order, etc.…
riddance, arran…
For other dialect…
c 1470 Henry *W*…
was brynt on brei…
15 Oct., Giffin to…
Inglismen to the se…
Anc. Sc. Poems (178…
Of all thair paks t…
vii. (1859) 236 T…
thorough redd.

2. That which…
rubbish, refuse.

1527–8 *Burgh Rec.*…
land of the townis..…
Charters (1859) p. …
thairof away, £11 15…
68, I just fan' a doo in…
umbld. Gloss. s.v., So…
from the bank top of a…
attrib. 1883 Gresl…
a spoil heap on the…
104 Downhill..swep…
for the building.

Redd, *sb.*² *Sc…*
raid, 9 read(d, …
separately or in…
the word also a…
rudd and *rude*,…
is far from clear.]

1. The spawn of…
redd-time, spawn…

1648 *Aberd. Reg.* (…
raid tyme fra all man…
1805 Andrew Scott…
friend, to meet you h…
sin' time o' redd. 18…
were lying on their red…

2. The nest mad…
which to spawn.

1844 *Zoologist* II. 505…
or spawning-ground. 1…

afraid..then the smallest red crosse [that] crosses the seas would be..of any French Piccaroun [etc.].

b. The Christian side in the Crusades.

1801 SCOTT *Fire-King* xxvi, The Red-cross wax'd faint, and the Crescent came on. *Ibid.* xxxvii, How the Red-cross it conquer'd, the Crescent it fell.

c. An ambulance or hospital service organized in accordance with the Geneva convention of 1864, and distinguished by a cross (see 1 c); a person attached to an ambulance or hospital of this kind.

1877 W. E. FORSTER in Reid *Life* (1888) II. iv. 169, I went down with Russian Red Crosses in the Austrian steamer. **1897** C. BIGHAM *With Turkish Army in Thessaly* xiv. 121 Detachments of the Red Cross, who worked efficiently and generously throughout.

3. *attrib.* **a.** (sense 1) as *red-cross ensign, flag, knight, power, rank, shield.*

1889 DOYLE *Micah Clarke* 23 He..had fought under the *red cross ensign against Frenchman, Don, Dutchman, and Moor. **1820** SOUTHEY *Portr. Bp. Heber*, All seas have seen thy *red-cross flag In war triumphantly display'd. **1590** SPENSER *F. Q.* I. vi. 38 The *Redcrosse knight was slain with Paynim knife. **1833** TENNYSON *Lady of Shalott* III. i, A red-cross knight for ever kneel'd To a lady in his shield. **1811** SCOTT *Don Roderick* III. ii, Till .. their own sea hath whelm'd yon *red-cross powers. **1777** T. WARTON *Poems* 64 When Arthur rang'd his *red-cross ranks On conscious Camlan's crimson'd banks. **1811** SCOTT *Don Roderick* II. lvi, Fast as they land the red-cross ranks unite. **1814** — *Ld. of Isles* VI. xxix, Alone, De Argentine Yet bears on high his *red-cross shield.

b. (sense 1 c or 2 c) as *Red Cross Association, hospital, man, Society.*

1873 C. A. GORDON *Lessons Hygiene* Introd., Societies and individuals connected with the Red Cross Associations. **1876** W. E. FORSTER in Reid *Life* (1888) II. iii. 124 The steamer was crowded with Russians, but many of them really Red Cross men, an ambulance from Kazan. **1878** *Temple Bar Mag.* LIV. 525 Women..who left their..home to work almost day and night in the rough barracks of the Red Cross hospitals.

So **Red-crossed** *a.*

1643 QUARLES *Emblems* V. xii, Tell me, my wishing soul, didst ever trie How fast the wings of red-crost faith can flie?

Red-crowned: see RED *a.* 14 b.

Red currant. **a.** The fruit of the *Ribes rubrum* (see CURRANT, sense 2) or the shrub itself. **b.** (See quot. 1808.)

FILE COPY

JAN 2 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION, PETITIONER

v.

A.P.W. PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR A.P.W. PAPER COMPANY, INC., RESPONDENT

EDWARD H. GREEN
E. H. SYKES
Attorneys for A. P. W. Paper Company, Inc.

SULLIVAN & CROMWELL
Of Counsel

INDEX

	PAGE
Questions Presented	1
Specification of Errors	3
Statement	4
Red Cross	5
Statutory History	8
Point I—The use by the respondent of the words and symbol "red cross" is expressly permitted by Congress, and the Commission is without jurisdiction to prevent such use	15
Point II—The order of the Circuit Court of Appeals was a proper exercise of its jurisdiction	34
Point III—The decision of the Court below was too favorable to the Commission	38
Conclusion	41

CITATIONS

Cases

Baltimore National Bank v. State Tax Commission, 297 U. S. 209	19
Caigan v. Pliblico Ioiitless Firebrick Co., 65 F. (2d) 849, cert. denied 290 U. S. 668	40
Charles of the Ritz Corporation v. Federal Trade Commission, 143 F. (2d) 676	39

PAGE

Connecticut Company v. *Federal Power Commission*, 324 U. S. 515 34

Federal Trade Commission v. *Algoma Lumber Company*, 291 U. S. 67 ..... 29, 30
Federal Trade Commission v. *Balme*, 23 F. (2d) 615 40
Federal Trade Commission v. *Royal Milling Company*, 288 U. S. 212 37
Federal Trade Commission v. *Standard Education Society*, 302 U. S. 112 ..... 38, 39, 40
Ford Motor Company v. *Labor Board*, 305 U. S. 364 38

Loonen v. *Deitsch*, 189 Fed. 487 ..... 8, 17
Louisiana v. *Mississippi*, 202 U. S. 1 20

McDonald v. *Commissioner*, 323 U. S. 57 19
McDonald v. *United States*, 279 U. S. 12 16

Pep Boys—Manny, Moe & Jack, Inc. v. *Federal Trade Com.*, 122 F. (2d) 158 40

Statutes:

Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. A. 4 ..... 1, 2, 3, 4, 5, 8, 21, 22

American National Red Cross Act of January 5, 1905:

Sec. 4, 33 Stat. 600, 36 U. S. C. A. 4 ..... 1, 2, 3, 4, 5, 8, 17, 21, 22, 24

Federal Trade Commission Act of September 26, 1914, Sec. 5, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. A. 45 ..... 1, 2, 3, 4, 5, 18, 19, 20, 24

Federal Trade Mark Act of July 8, 1870, 16 Stat. 210 7

PAGE

Congressional Material:

Cong. Rec. for January 19, 1944, pp. 387, *et seq.*... 13

Cong. Rec. for April 24, 1944, pp. 3633, *et seq.*..... 13

H. R. 6911, 77th Cong., 2d Sess..... 9

H. R. 7420, 77th Cong., 2d Sess..... 10

Hearings before the House Committee on Foreign Affairs on S. 469, 78th Cong., 2d Sess..... 5, 27

Hearings before the House Committee on Foreign Affairs on H. R. 6911, 77th Cong., 2d Sess..... 9

Hearings before the Senate Judiciary Committee on S. 2441 and H. R. 7420, 77th Cong., 2d Sess..... 11

House Reports:

2387, 77th Cong., 2d Sess..... 10, 11

2054, 78th Cong., 2d Sess..... 14

S. 2441, 77th Cong., 2d Sess..... 11

S. 1398, 78th Cong., 1st Sess..... 14, 25

S. 469, 78th Cong., 2d Sess..... 24

Senate Report:

534, 78th Cong., 1st Sess..... 12, 13, 23

Miscellaneous:

Barton, The Red Cross..... 7

Geneva Convention of August 22, 1864, with additional articles of October 20, 1868, proclaimed by the President as to the original convention, but with reserve as to the additional articles, July 26, 1882, 22 Stat. 940..... 6

Oxford English Dictionary..... 5

Red Cross Convention of 1929, 47 Stat. 2074..... 9

Webster, American Dictionary (1860 and prior eds.)..... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION, PETITIONER

v.

A.P.W. PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR A.P.W. PAPER COMPANY, INC., RESPONDENT

QUESTIONS PRESENTED

We must object to the Commission's statement of the questions presented, as it raises issues that do not exist.

The Commission states the question to be whether the Act of 1905, as amended in 1910, exempting the pre-1905 users of the words "Red Cross" and the sign of the Greek red cross "also exempts such prior users from the prohibitions of the Federal Trade Commission Act, as amended, even though a prior user is now found to be employing these words and symbol as an unfair and deceptive act or practice in interstate commerce".